Supreme Court, U.S.
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No. ——

IN THE

# Supreme Court of the United States

MOTION PICTURE INDUSTRY PENSION AND HEALTH PLANS,
*Petitioner*,

v.

N.T. AUDIO VISUAL SUPPLY, INC.
*Respondent.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Do multiemployer employee benefit plans retain the burden of proving that employer contributions are due, even where the failure of an employer to comply with its statutory duty to maintain records under ERISA makes it impossible or impracticable for the plans to do so?

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## OPINIONS BELOW

The decision of the court of appeals is reported at 259 F.3d 1063 and is reproduced in the appendix to this petition ("Pet.App.") at pages 1a -14a, *infra*. The decision of the district court is unreported, and is reproduced at Pet.App. pages 15a-23a, *infra*.

## GROUNDS FOR JURISDICTION

The judgment of the court of appeals was entered on August 7, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 209(a)(1) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C.

§ 1059(a)(1), imposes a duty on an employer to maintain records of the number of hours worked by employees. In relevant part, that section states:

> Except as provided by paragraph (2), every employer shall, in accordance with the regulations prescribed by the Secretary, maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees.

Section 107 of ERISA, 29 U.S.C. § 1027, also requires in part that:

> Every person subject to a requirement to file any report or to certify any information therefor under this subchapter. . . shall maintain records on the matters of which disclosure is required which will provide in sufficient detail the necessary basic information and data from which the documents thus required may be verified, explained, or clarified, and checked for accuracy and completeness. . . .

The full text of the statutes is set out in the Appendix. (Pet.App. 24a-26a).

## STATEMENT OF THE CASE

This case involves the ability of multiemployer employee benefit plans to enforce the obligation of employers to make contributions to those plans. The court below held, in a two to one decision, that an employee benefit plan retains the burden of proving that employer contributions are due, even when the failure of an employer to comply with its statutory duty to maintain records will make it impossible or impracticable for the plan to meet this burden.

This holding will substantially undermine the ability of multiemployer plans both to collect employer contributions and to deliver promised benefits to plan participants. Employers will be able to evade their obligations to make contributions to a plan precisely because of their failure to

comply with the obligation to maintain records pursuant to Sections 209(a)(1) and 107 of ERISA, 29 U.S.C. §§ 1059(a)(1) and 1027.

The decision directly conflicts with the decisions of three other circuit courts and with decisions of this Court.

### A. Relevant Facts

Petitioners are jointly trusteed, multiemployer pension and health plans (the "Plans") maintained pursuant to collective bargaining agreements between the International Alliance of Theatrical Stage Employes ("IATSE") as well as 33 other unions, and approximately 1,840 employers in the entertainment industry throughout the United States.

The collective bargaining agreements require contributions by employers to the Plans for every hour worked by its employees who perform work covered under the collective bargaining agreement ("covered work"). The contributions paid to the Plans are allocated to a separate defined benefit pension plan, a defined contribution pension plan and a health plan for active and retired participants.

The amount of contributions reported directly affects employees' eligibility for benefits. In order for employees to qualify for health benefits, and in order to earn a vested year of credit under the defined benefit pension plan, an employee must have contributions reported for a certain minimum amount of hours per year. Thus, the failure of an employer to accurately report contributions for an employee could deprive that employee of those benefits.

The failure of an employer to make contributions can also negatively impact the level of benefits provided to employees. Since a certain portion of the contribution is allocated to a defined contribution pension plan, the failure of an employer to accurately report contributions will directly affect the amount of money deposited into that employee's

account. Additionally, since a portion of the contributions are allocated to a defined benefit pension plan and to the health plan, the failure of an employer to accurately report contributions will result in fewer assets available to those plans from which the trustees of the plan can pay for benefits.

There is a large proportion of work in the entertainment industry which is freelance, i.e., employees are employed for one production for a limited period of time. Because of the freelance nature of the industry, many employees do not have regular employment and rely on a number of employers to report hours to the Plans. If one or more of those employers fail to report hours, or fail to keep accurate records, the participant may lose pension or health eligibility, or receive lower benefits.

Respondent N.T. Audio Visual Supply, Inc., (hereinafter "N.T. Audio" or the "Employer"), is a company which makes optical sound negatives for motion pictures. It was signatory to a collective bargaining agreement with the IATSE, which represented about 18 of its employees. Pursuant to that collective bargaining agreement, N.T. Audio was obligated to make contributions to the Plans.

The Trustees of the Plans audited N.T. Audio's records for the period from January 1, 1989 through March 20, 1993. Although the Employer made some contributions for employees covered by the IATSE bargaining agreement during that period, the Employer's records reflected that it had not made contributions for all hours worked by those employees during that period of time. In addition, the Employer had not made contributions with regard to certain cash payments which Employer documents indicated had been made to some employees. The Employer did not keep records from which the Plans' auditors could determine whether all of the work performed by the employees was work covered by the collective bargaining agreement. Furthermore, the Plans found that the Employer failed to keep

records supporting its position that the cash payments were not for covered work. (Pet.App. at 2a-3a, 7a).

Thus, while the Plans were able to determine from the Employer's records the total amount of time worked by employees and the amount of total compensation paid to those employees, they could not determine the extent to which the work performed, or the compensation paid was for covered work. Since the Employer's records did not permit a determination of the amount of time spent by the employees doing covered work, the Plans concluded that all of the time spent by those employees, and all of the compensation paid to them, was for covered work. (Pet.App. at 5a-7a). As a result, they determined that N.T. Audio owed the Plans approximately $32,000 in unpaid contributions based on over 6,000 hours of covered work and certain cash compensation, for which no contributions were paid. (Pet.App. at 2a). In response to the Plans' demand for payment, N.T. Audio objected to the finding but failed to provide any documents to substantiate its contention that the work performed was not covered work for which contributions were owed.

### B. Course of Proceedings Below

On May 13, 1997, the Plans filed suit in the Central District of California, alleging that N.T. Audio had failed to pay the contributions identified in the audit. The Plans invoked federal jurisdiction pursuant to 29 U.S.C. §§ 185, 1132 and 1145. The Plans filed a motion for summary judgment on December 15, 1997 and provided evidence that N.T. Audio failed to comply with the reasonable record keeping requirements of ERISA. The District Court entered summary judgment in favor of the Plans on January 6, 1998 and, following a denial of reconsideration, entered a final judgment in favor of the Plans on February 23, 1998. (Pet.App. at 15a-23a). N.T. Audio appealed.

On August 7, 2001, the United States Court of Appeals for the Ninth Circuit reversed the District Court decision. (Pet.App. at 1a-14a). The Ninth Circuit acknowledged that under ERISA, 29 U.S.C. § 1059(a)(1), employers have a duty to maintain records of the number of hours worked by employees. Citing its previous decision in *Brick Masons Pension Trust v. Industrial Fence & Supply*, 839 F.2d 1333 (9th Cir. 1988), the court noted that once the Plans produced evidence raising "genuine questions" about the accuracy of the employer's records and the number of hours worked by the employees, the burden shifts to the employer to come forward with evidence of the precise amount of work performed.

However, the court held that the Plans were also obligated to show that the unreported hours and unreported compensation "corresponded to covered work." (Pet.App. at 7a). The court held that while "it is true that each employee in question had performed some covered work for N.T. Audio, the auditors did not establish that any of the unreported hours corresponded to this covered work." (Pet.App. at 7a). The court held that the conclusion of the auditors and the Plans that all of the work was covered work was therefore without any basis.

Judge Pregerson, dissenting, noted that the new standard announced by the majority "imposes a difficult burden of production on the Plan Trustees and rewards employers who blatantly violate the record keeping duties imposed by ERISA." (Pet.App. at 10a). He further stated that the majority opinion "contravenes the policy concerns on which we based our decision in *Brick Masons*." (Pet.App. at 11a).

## REASONS FOR GRANTING THE WRIT

### I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS

The decision below is inconsistent with previous decisions of this Court, the Ninth Circuit's previous holdings, and decisions in the Sixth, Eighth and Eleventh Circuits. On the other hand, the decision below is consistent with a decision of the Seventh Circuit.

It is particularly important to resolve this conflict among the circuit courts since many multiemployer employee benefit plans—like the petitioner—are national in scope, including participating employees and employers which reside throughout the United States. The result of these conflicting decisions is that these national plans, and many employers, will be forced to operate under conflicting rules of law.

The decisions of the Sixth, Eighth and Eleventh Circuits, as well as the *Brick Masons* decision of the Ninth Circuit, each rely on the decision of this Court in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), a case involving the Fair Labor Standards Act ("FLSA"). In *Anderson*, this Court held that where an employee contends that he or she was not properly compensated under that statute, and where an employer fails to keep proper records in conformity with its statutory duty to do so, the burden is on the employer "to come forward with evidence of the precise amount of the work performed or evidence to negate the reasonableness of the inference to be drawn from the employee's evidence." 328 U.S. at 687-688.

The Eleventh Circuit was the first court to consider this issue in the context of ERISA. In *Combs v. King*, 764 F.2d 818 (11th Cir. 1985), the court noted that under both ERISA and the FLSA, employers have similar record keeping obligations, and both statutes were enacted to protect em-

ployees. The court found the approach in *Anderson* directly applicable and, as a consequence, once a plan audit raised a reasonable inference that work had been performed on which contributions were due to the plans, the burden shifted to the employer to produce records contradicting the reasonable inference that contributions were due regarding all of the work in question. 764 F.2d at 827.

The *Combs* decision was followed by the Ninth Circuit in *Brick Masons Pension Trust v. Industrial Fence & Supply*, 839 F.2d 1333 (9th Cir. 1988). In that decision, the court noted that "[b]oth the language and the legislative history of ERISA clearly require employers to keep records of their employees' hours in order to permit the calculation of benefits due." 839 F.2d at 1338. Since the "records employers are required to keep . . . may be the only evidence available to employees to prove that their employers have failed to compensate them in accordance with the statute," the court held that "[a]n employer cannot escape liability for his failure to pay his employees the wages and benefits due to them under the law by hiding behind his failure to keep records as statutorily required." *Id*; *see also Operating Engineers Pension Trusts v. B&E Backhoe*, 911 F.2d 1347, 1354 (9th Cir. 1990) (following *Brick Masons*).

In *Michigan Laborers' Health Care Fund v. Grimaldi Concrete*, 30 F.3d 692 (6th Cir. 1994), the court followed "the sensible approach" taken by the Eleventh Circuit in *Combs* and the Ninth Circuit in *Brick Masons*. 30 F.3d at 696. Like *Combs* and *Brick Masons*, this case involved a situation where employees performed both covered and non-covered work. Because the employer had no records for the majority of the work in question, the plan auditors were unable to determine the amount of covered work. The court held that since the employer had no records for 80 percent of the work performed, the employer was liable for contributions "on all hours worked during a period in which it

has been demonstrated that some covered work was performed." *Id.* at 697.

In *Stanton v. Larry Fowler Trucking*, 52 F.3d 723, 727-28 (8th Cir. 1995), the Eighth Circuit adopted the same reasoning in a closely related context. In that case, the issue was whether an employee had received adequate notice of the termination of health insurance under the Consolidated Omnibus Budget Reconciliation Act ("COBRA"). Noting that the employer had an ERISA obligation to maintain records of such notice pursuant to § 209, 29 U.S.C. § 1059 (and pursuant to the analogous obligation of plan administrators found at 29 U.S.C. § 1027), the court held that where the employee maintains that he did not receive such notice, the employer may not maintain otherwise where the employer has failed to keep records of the notice.

In contrast to the decisions of these circuits, the Seventh Circuit has required plans to prove that contributions are due even when an employer has failed to maintain records which would permit the plans to do so. In *Illinois Conference of Teamsters and Employers Welfare Fund v. Steve Gilbert Trucking*, 71 F.3d 1361 (7th Cir. 1995), the employer maintained that only 80 to 90 percent of the hours for which the employees were paid was covered work, but the employer did not maintain any records documenting that claim. While the court agreed that the employer had the burden of coming forward with evidence once it was shown that it had not maintained records, the court found sufficient an affidavit from the employer simply making the assertion in conclusory form, thereby eviscerating the utility of the *Combs/Brick Masons* decisions. Only after the trust funds undertook the risk and expense of a trial following remand was judgment entered against the employer. *Illinois Conference of Teamsters and Employers Welfare Fund v. Steve Gilbert Trucking*, 953 F. Supp. 1026, 1032-1034 (C.D. Ill.), *aff'd w/o opinion*, 129 F.3d 1267 (7th Cir. 1997).

The Ninth Circuit in the decision below has now joined the Seventh Circuit in erecting a substantial barrier to the ability of employee benefit plans to economically enforce contribution obligations of participating employers. The decisions of these two circuit courts conflict with the decisions of three other circuit courts, which have properly held that the failure of an employer to maintain records as required by the statute precludes the employer from contending that contributions were not due.

## II. THE DECISION BELOW CONTRAVENES THE INTENT OF ERISA BY UNDERMINING THE FINANCIAL SOLVENCY OF EMPLOYEE BENEFIT PLANS, MAKING IT IMPOSSIBLE OR IMPRACTICABLE FOR PLANS TO COLLECT CONTRIBUTIONS FROM EMPLOYERS AND DEPRIVING EMPLOYEES OF BENEFITS TO WHICH THEY ARE ENTITLED

### A. ERISA Mandates Expeditious Judicial Enforcement of Employer Contribution Obligations

The legislative history of ERISA shows that one of the primary purposes of Congress was to expedite the judicial enforcement of the collection of delinquent contributions owed by employers. In 1980, Congress amended ERISA by enacting the Multiemployer Pension Plan Amendments Act of 1980 ("MPPA"). The 1980 Act included revisions of § 502, 29 U.S.C. § 1132, and a new § 515 of ERISA, 29 U.S.C. § 1145. The new § 1145 created an ERISA right of action to recover delinquent contributions from a participating employer. This objective was further accomplished through the elimination of defenses deemed extraneous to the contract enforcement action, and by assuring that the employee benefit plans would be made whole for all losses arising from employer delinquency.

In *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport*, 472 U.S. 559 (1985), this Court recognized this legislative intent in construing the application of ERISA Sections 502 and 515. The Court reiterated that a central purpose of ERISA is to insure the "financial soundness" of employee benefit plans "by making sure that if a worker has been promised a defined pension benefit upon retirement . . . he will actually receive it." [1] 472 U.S. at 569. The Court noted that "one of the principal congressional concerns motivating the passage of the Act, [was] that plans should assure themselves of adequate funding by promptly collecting employer contributions." *Id.* at 580.

In order to accomplish these goals, and consistent with the fact that "one of the fundamental common-law duties of a trustee is to preserve and maintain trust assets," *Id.* at 572, the Court held that ERISA does not simply authorize audits of participating employers, but in fact mandates that trustees act diligently to "prevent participant employers from gaining even temporary use of assets to which the plan is entitled." *Id.* at 573. Consistent with this obligation, the trustees have a "fiduciary duty . . . to gain immediate use of trust assets for the benefit of the trust, to avoid the time and expense of litigation." *Id.* at 580.

Barriers to collection of delinquencies—such as those created by the decision below—are contrary to the policies underlying ERISA that employers not be "free to cheat their employees or bury their reporting mistakes," *Northern California Retail Clerks v. Jumbo Markets*, 906 F.2d 1371, 1373 (9th Cir. 1990), and are inconsistent "with Congress' intent in ERISA to provide 'broad remedies' and 'to remove jurisdictional and procedural obstacles which in the past

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[1] The Court noted that these goals were not confined to pension benefits, and instead were applicable to all employee benefit plans. *Central States*, 472 U.S. at 570 n.9.

appear to have hampered effective . . . recovery of benefits due to participants.'" *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 343 (D.C. Cir. 1991).

### B. The Decision Below Makes it Impossible or Impracticable for Plans to Collect Contributions

Essential to the statutory scheme designed by Congress to permit expeditious enforcement of employer contribution obligations are the record keeping obligations imposed on employers by § 209(a)(1) of ERISA, 29 U.S.C. § 1059(a)(1) and the corresponding duties imposed by § 107, 29 U.S.C. § 1027. Section 209(a)(1) requires an employer to "maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees." Without such records, plans cannot effectively fulfill their obligation to preserve and maintain trust assets by means of an effective audit program. *See Central States*, 472 U.S. at 573.

Requiring plans to prove that contributions are due when an employer fails to maintain records required by these statutory provisions will make it impossible or impracticable for plans to collect contributions. As a result, the value of plan assets will be substantially discounted, thereby depriving employees of benefits while rewarding employers who violate the record keeping requirements of ERISA.

#### 1. *Plans Will Often Be Unable to Prove That Contributions Are Due*

Unless an employer maintains adequate records, it will be unlikely that such information will be available to the plans. The observation of this Court in *Anderson*, *supra*, in the context of a Fair Labor Standards Act claim, is no less true in the ERISA collection context:

> . . . it is the employer who has the duty under § 11(c) of the [Fair Labor Standards] Act to keep proper records of

> wages, hours and other conditions and practices of employment and who is in the position to know and to produce the most probative facts concerning the nature and amount of work performed. Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy.

*Anderson*, 328 U.S. at 687. Similarly, if employers fail to keep records from which a plan may determine whether contributions are due, it is unlikely that a plan will be able to prove that such contributions are due.

The court below ignored the implications of the employer's failure to keep records when it found that the Plans were obligated to come forward and demonstrate that "any of the unreported hours corresponded to covered work." (Pet.App. at 7a). The court below was not simply requiring the Plans to show that the individual employees at times performed covered work, since the court acknowledged that the Plans had already shown that all of the employees in question did, in fact, perform covered work some of the time. (Pet.App. at 7a). Instead, the court was requiring the Plans to show that the particular hours in question were "covered." For the reasons stated by this Court in *Anderson*, this will often be impossible.

### 2. *Even If It is Not Impossible to Prove That Contributions Are Due, Plans Will Be Forced to Undertake Expensive and Risky Litigation in Order to Attempt to Collect Contributions*

Even if it is not impossible to gather information that certain work is covered, it will be most often impracticable. Putting the burden on the plan to come forward with evidence that the work was covered will require auditors to spend an inordinate amount of time documenting the nature of the work done. In the absence of records, that inquiry will likely

involve interviews with employees and other employer personnel and, in some cases, preparing employee affidavits. The expense of such audits would be so great that plans will often reasonably choose not to incur the cost, particularly if it requires neutral plan staff to solicit management or labor cooperation in order to obtain employee statements for trust fund audits.

Even if employee affidavits or other evidence can be obtained, the plan's claim can apparently be refuted by contrary—albeit undocumented—employer contentions. The result will be uncertain and costly litigation. That this possibility is more than theoretical can be seen from experience in cases which have adopted the Seventh Circuit's *Steve Gilbert* formulation. That approach has resulted in an increased number of trials in cases which, in other circuits, could have been resolved through summary judgment. *See, e.g., Central Pension Fund v. Murphy's Tire*, 1998 U.S. Dist. LEXIS 19369, *22-25 (N.D.N.Y. 1998) (unreported) (no summary judgment where employer president claimed work was performed outside of union's jurisdiction and, therefore, was not covered); *Hanley v. Adam*, 1998 U.S. Dist. LEXIS 13495, *20-27 (N.D. Ill. 1998) (unreported) (denying motion for summary judgment because employer questioned audit calculation); *Composition Roofers Union Local No. 30 Welfare Trust Fund v. L.A. Kennedy, Inc.*, 1996 U.S. Dist. LEXIS 5737, *17-21 (E.D. Pa. 1996) (unreported) (no final judgment where employer raised questions about plan auditing methods). The increased number of trials, of course, leads to higher costs, greater risks and more unnecessary litigation, all of which further deplete valuable plan assets.

The uncertainties of litigation will significantly discount the value of delinquent contributions. Prior to engaging in collection actions, plans will have to consider the increased expenditures of plan assets required to collect delinquent contributions and the increased risks of litigation. This

evaluation will often result in a greater discounting of the contribution obligation of employers who have failed to maintain adequate records.

### 3. *The Barriers to Collection of Contributions Endangers the Delivery of Benefits to Employee Participants*

The failure of an employer to make contributions will adversely affect the amount of assets available in general to the plans. When a plan has fewer assets, it stands to reason that it will be able to provide fewer benefits to all participants. In addition to this impact on the overall assets available to the plans, the failure of an employer to make contributions could also substantially and adversely affect the eligibility of individual participants for health and pension benefits, as well as the level of benefits provided to those individuals. This is because the eligibility for, and level of, benefits are often based on the amount of covered work performed by individual employees.[2]

Therefore, if an employer does not make contributions for an employee, that employee might not be eligible for health benefits and might not earn a year of credited service under the pension plan. This is of particular concern in a freelance industry such as the entertainment industry, where many employees do not have steady work and find it difficult to

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[2] Employees must have a minimum of 600 hours reported in a six month period to obtain initial eligibility for health coverage. Thereafter, employees continue to be eligible for health benefits if they have 300 reported hours in a subsequent eligibility period. The Health Plan Summary Plan Description specifically provides that "eligibility for benefits is contingent upon whether your employer(s) makes the appropriate contributions to the Plan in accordance with the Trust Agreement." Employees must earn a minimum of 400 hours of credited service in order to earn one year of credit in the defined benefit pension plan.

work sufficient hours under the collective bargaining agreement to qualify for these benefits.

Even if an employee works enough to be eligible for certain benefits, the failure of an employer to make contributions on the employee's behalf will result in fewer assets allocated to that individual's account maintained under the defined contribution pension plan.

### 4. *The Potential Problems Created by the Decision Below Will Result in Even Greater Abuses by Employers in the Future*

The decision below will provide a road map for employers who wish to evade their contribution obligations to multi-employer employee benefit plans. As pointed out by the dissent in *N.T. Audio*, the approach adopted by the majority "rewards employers who blatantly violate the record keeping duties imposed by ERISA." (Pet.App. at 10a). Employers will be rewarded not only by avoidance of contribution obligations, but also by the cost savings engendered by their failure to keep records. It is reasonable to expect that competing employers in the same industry will be tempted to cease keeping records in order to obtain the same cost savings.

As noted above, because of the high costs and risks of litigation, plans will often be forced to compromise on collection demands when employers fail to keep records. The decision below thus threatens to seriously undermine, on a broad scale, the intent of Congress to expedite plan collection actions in order to promote the financial health of those plans and permit the delivery of promised benefits.

## CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant this Petition for Certiorari.

Respectfully submitted

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